No. 89-1909

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FEIST PUBLICATIONS, INC.,
Petitioner,

v.

RURAL TELEPHONE SERVICE COMPANY, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF THE INFORMATION INDUSTRY ASSOCIATION AND ADAPSO, THE COMPUTER AND SOFTWARE SERVICES INDUSTRY ASSOCIATION, INC. AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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The Information Industry Association ("IIA") and ADAPSO, The Computer and Software Services Industry Association, Inc. ("ADAPSO"), hereby respectfully submit the attached brief as *amici curiae* in support of neither party in this case. The consent of the attorneys for the Petitioner, Feist Publications, Inc. ("Feist") and Respondent, Rural Telephone Service Company, Inc. ("RTSC") has been requested and received.[1]

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[1] The written consent of the Petitioner and Respondent are being filed with the Clerk of the Court contemporaneously with this brief, pursuant to Rule 36 of the Rules of this Court.

INTEREST OF THE *AMICI*

IIA is a trade association, founded in 1968, that represents some 800 companies involved in the generation, distribution, transmission and use of information. This case involves a dispute between two publishers of "white pages" telephone directories: a provider of local telephone exchange service and a competitor independent of the telephone business. Most major "white pages" publishers, in both categories, belong to IIA.

IIA membership also includes most of the largest providers of communications common carrier services, as well as most leading providers of electronic databases and similar information products and services. The latter group includes providers of financial information services, bibliographic databases, demographic and geographical information systems, credit reporting systems, and a wide range of products based on government and other public domain materials, including legal, statistical, scientific and other databases. These publishers and information providers have a direct interest not only in copyright protection of the databases and other compilations of which they are the proprietors, but also in meaningful access to unprotected materials for the development of new information products and services. Thus, a broad cross-section of IIA members is vitally interested both in the specific dispute before the Court, and in its general implications for the scope of copyright in compilations.

IIA members also have extensive practical experience in the development and distribution of compilations, and are in the forefront of developing and implementing new ways to organize, present, disseminate and use information, particularly through electronic media. This experience may provide useful insights for the Court's disposition of this case.

Finally, IIA's entire membership is vitally interested in the development and adaptation of copyright law to provide strong incentives for the development of works of new technology. This case could have a significant impact upon the evolution of copyright protection for a wide range of such works, including computer programs. From its earliest days, IIA has participated actively in major debates on the future of copyright policy, in legislative and other arenas. In the same spirit, it respectfully offers its perspectives on the instant case.

ADAPSO was founded in 1961 and is the premier trade association for information technology companies. Its more than 600 corporate members provide the products and services which facilitate the useful application of information technology. ADAPSO member companies create and market products, services, or both, associated with computers, communications and data, where the primary values added are human resources, software and information content.

More specifically, ADAPSO's membership includes major providers of telecommunications networks which 1) distribute data processing, database or other information services; or 2) provide packet code, protocol and format conversion; electronic mail; electronic data interchange; information gateways; voice messaging; or other network-based computer services. As such, ADAPSO members are both providers and users of electronically stored and transmitted information, interested both in copyright protection for the databases and other compilations of which they are the owners and reasonable access to information from which to create new products and services. ADAPSO and its member companies have a practical interest in this case.

ADAPSO and its member companies are also interested in the adaptation of the copyright system to new technologies, a major issue raised by this case. ADAPSO

has approached this Court on several prior occasions regarding the intellectual property law system and the appropriate application to new information technologies and respectfully offers its assistance and insight in this case.

SUMMARY OF THE ARGUMENT

Although the case before the Court concerns the scope of copyright in "white pages" telephone directories, its disposition could affect legal protections accorded to a wide range of commercially valuable compilations. These works, which have become increasingly important to many fields of business, research, and professional endeavor, are, like "white pages," made up of materials that are not individually protectible by copyright. However, the authorship exhibited in "white pages" is in several important respects distinct from that found in other compilations of individually unprotected material. These distinctions argue for a narrow disposition of this case.

To the extent that the Court uses this case to delineate broadly applicable rules on the scope of copyright in compilations, it should carefully consider both the nature of authorship in compilations and the approaches taken by lower courts in defining and identifying it. The Court should seek to harmonize these precedents by focusing on the Copyright Act standard of originality. Its resolution of the case should reflect the importance of adequate copyright protection in providing incentives for the diverse aspects of authorship that play a role in the development of modern electronic databases and other compilations. It should also consider the practical consequences of inadequate protection for the information industry and the public as a whole. In this way, the Court can use this opportunity to affirm and strengthen the legal foundation of copyright in compilations.

ARGUMENT

I. THE COURT SHOULD EXERCISE CAUTION IN EXTENDING THE SCOPE OF ITS DECISION IN THIS CASE TO COMPILATIONS BEYOND "WHITE PAGES" TELEPHONE DIRECTORIES

A. A Wide Range Of Commercially Vital Compilations Receive Copyright Protection Under The Same Statutory Provisions As "White Pages"

The issue before the Court concerns the scope of copyright protection in a telephone directory. Petitioner Feist seeks reversal of the ruling that it infringed the copyright of respondent RTSC in its "white pages"—the alphabetical listing of the names, addresses and telephone numbers of RTSC's telephone subscribers. "White pages" directories are ubiquitous, and the Court's disposition of this case will have an important impact on the information industry even if it is expressly limited to "white pages."[2]

However, the impact of this case will not necessarily be so limited. In the taxonomy established by the Copyright Act of 1976, 17 U.S.C. sec. 101 (1988) ("the Act"), "white pages" belong to one species of a much broader and more varied genus of work protected by copyright: compilations. The Act defines a compilation as:

> a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the re-

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[2] As this case illustrates, "white pages" directories may be issued either by monopoly providers of local telephone service (such as RTSC) or by competitive publishers (such as Feist). Of the 125,020,023 access lines served by local exchange carriers in the United States, IIA's members include five of the seven largest providers, serving 43 of the 50 states, as well as the leading competitive telephone directory publishers. *See generally* Federal Communications Commission, Preliminary Statistics of Communications Common Carriers (1990).

sulting work as a whole constitutes an original work of authorship.

17 U.S.C. sec. 101. Since copyright protection extends to "original works of authorship," 17 U.S.C. sec. 102(a), this definition entitles compilations to generic protection, subject to the specific limitations contained in 17 U.S.C. sec. 103.[3]

"White pages" directories, such as those involved in this case, belong to the category of compilations in which the "materials or . . . data" included in the copyrightable compilation are not themselves subject to copyright protection.[4] In this case, the data that have been compiled consist of names, addresses and telephone numbers of RTSC subscribers.

It has been nearly a century since this Court last examined a claim of infringement of copyright in a similar compilation. That case involved "a book of reference containing lists of merchants, manufacturers and traders . . . ." *Dun v. Lumbermen's Credit Ass'n.*, 209 U.S. 20, 21 (1908). Then, the variety and pervasiveness of compilations of otherwise unprotected data was rather limited. Today's environment is completely different.

Compilations consisting predominantly of material not protected by copyright are now familiar throughout the United States and the world. These compilations are diverse in subject matter, format and medium. They have become indispensable to the functioning of commerce and finance and the pursuit of scientific research and educational endeavors. The development, production and distribution of such compilation is a growing and dynamic sector of U.S. industry. This sector demands high levels of investment and continuing commitment to innovation in order to meet global competition. Copyright protection for compilations, based on the statutory provisions involved in this case, is a key legal incentive for encouraging this investment and innovation for the benefit of the public. *See* U.S. Const. art. I, sec. 8, cl. 8 (Congress empowered to enact legislation to "promote the Progress of Science and Useful Arts"); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("[t]he economic philosophy behind the [copyright clause] is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare").

Accordingly, in resolving this dispute between competing publishers of directories containing the names of 5,000 telephone subscribers in parts of 11 counties in northwest Kansas, Pet. at 4, the Court also should bear in mind the range of compilations that could be affected by a broadly phrased holding. These compilations fall into two main categories.[5]

First, there are compilations, like the one at issue here, made up of "facts," or, perhaps more precisely, of factual statements that do not individually show enough originality to rise to the level of protectible expression. However, as this Court has observed, "[c]reation of a nonfiction

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[3] These limitations are discussed in section II, *infra*.

[4] The other main species of compilation, a "collective work," includes assemblages of "separate and independent works" that are themselves copyrightable. 17 U.S.C. sec. 101. While RTSC's directory as published may include independently copyrightable material —what Feist refers to as "authored forward text and yellow page advertising," Pet. at 9—those works were not copied by Feist and their status is not involved in this case.

[5] Most of the examples in the following list, which is far from exhaustive, refer to "databases." This term does not appear in the Copyright Act, but is commonly (if imprecisely) used to refer to compilations of data in electronic format, delivered to computer terminals or other facilities, either through telecommunications links or in physical media such as magnetic tape or compact disk. Many of the databases described in the text are also available in print form. Since protection under the Act is unaffected by the "medium of expression" employed, 17 U.S.C. sec. 102(a), the scope of protection for a compilation is the same whether the work appears in hard copy or in an electronic format.

work, even a compilation of pure fact, entails originality," and hence protectible expression. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 547 (1985). The facts in the "white pages" consist of names, addresses and telephone numbers. Other compilations of facts include:

> *Financial Information Databases.* The stock quotation "IBM 108 3/8 + 1 1/8" may not be protectible by copyright. But the collection and assembly of this and many other similar statements, and their arrangement in any of a wide variety of ways, can satisfy the criteria for protection as a compilation. Examples range from the familiar stock tables or earnings reports in the financial pages of the daily newspaper, to customized data subsets based on industry sector, geography, enterprise size or other factors. Financial databases, whether historical "snapshots" of corporate financial performance or systems that reflect current trading, are today indispensable tools for investors, regulators and participants in all financial markets.
>
> *Credit Reporting Systems.* Each business day, hundreds of thousands of business decisions are made on whether to grant credit to an individual or company seeking it. The factual basis for these determinations is drawn from copyrightable compilations of credit data. The data themselves—factual statements concerning credit history—often are not individually eligible for copyright protection.
>
> *Demographic Databases.* In these compilations, uncopyrightable data items on defined categories of people are collected and arranged in a variety of ways. The data consist of factual statements about subjects ranging from buying habits to neighborhood traffic patterns, from property tax records to stated political affiliations. The resulting databases play a dominant role in marketing, fundraising and planning decisions of incalculable significance.
>
> *Bibliographic Databases.* Researchers and students worldwide rely upon compilations ranging from traditional card catalogs to computerized systems of references to medical, scientific or legal literature (for example, SHEPARD's citations). While some of these databases include expository summaries or abstracts of the contents of the works indexed, even those limited to catalog number, author, title, publisher and similar factual information are protectible as compilations.
>
> *Economic and Industrial Databases.* These compilations assemble and present statistical data on housing and construction, trade, manufacturing, agriculture, natural resources, health, transportation, and other quantifiable aspects of economic and social activity. These databases underpin momentous decisions made every day at all levels of business and government.

A second category consists of compilations of items that would individually qualify as works of authorship but for exclusions established by statute or judicial decision. Such works include reports and other documents created by federal government personnel, as well as federal and state judicial opinions, statutes and regulatory materials.

This Court long ago concluded that its opinions, and those of state court judges, were in the public domain. *Wheaton v. Peters*, 33 U.S. 591, 668 (1834); *Banks v. Manchester*, 128 U.S. 244, 253 (1888). Section 105 of the Act denies copyright protection to "any work of the United States Government," 17 U.S.C. sec. 105, thus excluding agency materials and other works created by federal employees. Federal courts have consistently barred, on due process grounds, state assertions of copyright in statutes or regulations. *Davidson v. Wheelock*, 27 F. 61, 62 (C.C.D. Minn. 1866); *Howell v. Miller*, 91 F. 129, 137 (C.C.A. Mich. 1898); *Building Officials & Code Administrators v. Code Technology, Inc.*, 628 F.2d 730, 734-35 (1st Cir. 1980). This Court further has made it clear that copyright may be recognized in private compilations of such individually unprotected public domain materials. *Callaghan v. Myers*, 128

U.S. 617, 649 (1888); *see also West Publishing Co. v. Mead Data Central, Inc.*, 799 F.2d 1219, 1224-25 (8th Cir. 1986), *cert. denied*, 479 U.S. 1070 (1987). Familiar examples of such compilations include the legal databases of WESTLAW, LEXIS and VERALEX, as well as compilations of reports of federal researchers and of federal statistical data on prices, wages and similar topics.[6]

In short, "white pages" directories represent a familiar but minute slice of a much wider category of compilations protected by copyright, even though the items collected in the compilation do not individually enjoy such protection. Furthermore, when compared with other members of this category, "white pages" are in several ways strikingly atypical, if not unique.

B. The Distinctive Characteristics Of "White Pages" Make This An Inappropriate Case For The Delineation Of Sweeping Rules On Compilation Copyright

Virtually all "white pages" compilations published by monopoly providers of local exchange telephone service, including the RTSC directory involved in this case, share several important attributes. These characteristics may influence the scope of copyright protection these directories enjoy.

First, virtually all "white pages" have the same type of contents, organized in a nearly identical manner: a listing of telephone subscribers, alphabetized by surname, followed by street address and telephone number. This rigid format probably dates from the earliest days of direct-dial telephony. It is universally observed in directories published by local exchange telephone companies.

[6] Other categories of compilations whose contents are not themselves protected by copyright exist, but are less significant. For example, copyright would protect a compilation of published works that are individually unprotectible due to their national origin, *see* 17 U.S.C. sec. 104, or because they have fallen into the public domain through expiration of the term of copyright.

Second, the telephone company obtains the information contained in the compilation in the course of fulfilling its obligation to provide telephone service under a monopoly franchise awarded by government. It would be impossible to fulfill this obligation without creating and maintaining a database of the names and addresses of telephone subscribers and the telephone numbers assigned to them by the company. This is precisely the information contained in a "white pages" directory.

Third, in many instances, the local telephone company is required to publish the "white pages" directory, either by statute or as a regulatory condition of its right to exercise the monopoly franchise. *See, e.g., Illinois Bell Tel. Co. v. Haines and Co., Inc.*, 905 F.2d 1081, 1084 (7th Cir. 1990); *rehearing denied*, No. 89-2207, slip op. (7th Cir. August 6, 1990); *stay granted pending decision on petition for writ of certiorari*, No. A0187, slip op. (U.S. Sup. Ct. September 11, 1990); *Hutchinson Tel. Co. v. Fronteer Directory Co.*, 770 F.2d 128, 129 (8th Cir. 1985). Customarily, the franchise terms entitle every telephone subscriber to be listed in the "white pages" without additional charge, and authorize the telephone company to charge for the privilege of being omitted as a "non-published number."

Some lower courts have held that these characteristics are irrelevant to the *existence* of copyright protection for "white pages" as compilations. *See, e.g., Hutchinson*, 770 F.2d at 131 (rejecting District Court holding that the Act "excludes copyright protection" for directories required by law to be published). However, the characteristics clearly bear some relevance to the statutory definition of compilation set forth in 17 U.S.C. sec. 101, and may appropriately influence a decision on the *scope* of protection to be accorded. For example, to the extent that "arrangement" of data is one element of the authorship protected by copyright in a compilation, the fact that all "white pages" contain the same types of information

presented in a virtually identical way is relevant to whether protectible expression has been taken by an alleged infringer who uses the same basic format to present the same information. Similarly, the fact that the information in "white pages" is obtained as an incident of providing monopoly telephone service is relevant to the nature of "collection" of data that may be an element of protectible authorship under the compilation definition.

While each of the characteristics listed above may be found to some degree in other copyrightable compilations, few other commercially significant compilations besides "white pages" would exhibit all of them. For instance, compilations on similar subject matter may vary widely in format and level of detail. A financial information database may include "bid and ask" prices on a given security, or it may be limited to information on the latest sale. Similarly, many commercially significant databases are valuable precisely because they bring together data from a wide range of disparate sources, rather than confining themselves to information gathered in the course of fulfilling a single business purpose.

The Court should consider these unusual characteristics of "white pages" compilations in resolving the dispute presented in this case: the scope of copyright protection in a compilation.[7] A solution of that dispute that is appropriate for "white pages" may well be completely inappropriate for other compilations of unprotected material.[8]

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[7] Copyrightability *per se* of "white pages" directories is not in dispute. Pet. at 9.

[8] Because the "white pages" copyright proprietor is usually a state-authorized monopolist, disputes over the use of such compilations may turn as much on antitrust principles as on copyright. This case is no exception, although the antitrust issues are not before this Court. *See Rural Tel. Serv. Co. v. Feist Publishing, Inc.*, 773 F. Supp. 610 (D. Kan. 1990). The issue of competitor access to telephone company customer information has been vigorously debated before the Federal Communications Commission in its Open Network Architecture proceedings. Filing and Review of Open Network Architecture Plans, 4 FCC Rcd 1 (1988), *recon.*, 5 FCC Rcd 3084 (April 1990). Neither the ubiquity of antitrust claims nor the involvement of specialized regulatory agencies make "white pages" disputes unique among controversies over compilation copyright. However, both factors counsel caution in employing such disputes as vehicles for laying down broad copyright rules to govern other controversies in which neither factor may be present.

The parties dispute whether Feist has copied protectible compilation authorship or solely unprotectible "preexisting material." 17 U.S.C. sec. 103(b).[9] The authorship that goes into production of the "white pages"—in statutory terms, the way in which the work is "collect[ed] and assembl[ed]" and the data "selected, coordinated or arranged," 17 U.S.C. sec. 101—is atypical when compared to the authorship found in other compilations of individually unprotected materials. The clearest way to draw the line between authorship and preexisting data in this case is to confine the decision to the unusual contours of authorship in the "white pages" environment. Such a resolution will provide the most useful guidance to the parties, and to the lower courts. It would minimize the confusion that would otherwise arise from efforts to apply the decision to cases involving substantially different examples of compilation authorship. Finally, it would conserve judicial resources and avoid an activist decision on issues not presented to the Court in this case.

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[9] Section 103(b) provides, in relevant part, that "the copyright in a compilation . . . extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material." 17 U.S.C. sec. 103(b). Of course, whenever authorship is copied, so is "preexisting material." In this sense, a compilation is no different than any other work of authorship. The plagiarist of a novel takes unprotectible letters, words and phrases; the copier of a symphony takes unprotectible notes and chords. Each takes more as well.

II. IF THE COURT'S DECISION IS BROADLY APPLICABLE TO OTHER COMPILATIONS, IT SHOULD CLEARLY AFFIRM THE LEGAL FOUNDATION OF COPYRIGHT IN COMPILATIONS, INCLUDING DATABASES

The foregoing considerations argue strongly for a narrow disposition of this case. However, the Court could choose to use this case to announce broader standards for determining the scope of copyright in compilations of factual material or other unprotected matter. Such a resolution could have a significant impact on the information industry as a whole. Its impact is most likely to be positive if it harmonizes the approaches taken by different lower courts, and takes into account the business realities of creating, distributing and using compilations of materials not themselves individually protected by copyright. In this way, the Court can affirm the importance of clear, consistent copyright protection for these compilations.

A. The Court Should Seek To Harmonize The Two Main Approaches To Compilation Copyright

Section 101 of the Act defines a compilation as "an original work of authorship," 17 U.S.C. sec. 101, while section 103(b) distinguishes between the "material contributed by the author" of a compilation, and "the preexisting material employed in the work." 17 U.S.C. sec. 103(b). The former is protected by copyright; the latter is not. This case turns on whether Feist copied compilation authorship or merely preexisting materials. The decisions cited by the parties are efforts to locate more precisely, in the context of compilations, "the line drawn [by the Act] between uncopyrightable facts and copyrightable expression of facts." *Miller v. Universal City Studios*, 650 F.2d 1365, 1371 (5th Cir. 1981).

The differing approaches of the lower courts to this question are presented to this Court as "a split in principle," Pet. at 10, and "a serious division among the circuits," Brief of Amici Curiae in Support of Petition for Certiorari at 5. IIA and ADAPSO submit that the dichotomy may be much less sharp than petitioner suggests.[10] Indeed, common threads running throughout the precedential fabric suggest that any "split in principle" may have limited practical effect, and that any doctrinal "division" can be bridged.[11]

Feist calls the two approaches "sweat of the brow" and "selection and arrangement." Pet. at 10. The labels may be misleading. The approaches can better be viewed as emphasizing different aspects of the same statutory language: the Act's definition of "compilation," 17 U.S.C. sec. 101. The so-called "sweat of the brow" cases—more accurately linked with the phrase "industrious collection"[12]—stress the "collection and assembling" of materials or data as an aspect of compilation authorship. The "selection and arrangement" cases focus on the other elements of compilation authorship in the statutory

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[10] Of course, to the extent that perceived inter-circuit conflicts raise doubts about the existence and scope of protection for databases and other compilations, the *status quo* may discourage investment in development of innovative and useful compilations. It would be anomalous if a database distributed over a nationwide computer network enjoyed different copyright protections in some states than in others. There is reason to question the extent to which this anomaly has occurred.

[11] Several decisions have held that yellow pages directories satisfy the criteria for copyrightability as a compilation under either approach. *Southern Bell Tel. & Tel. Co. v. Associated Tel. Directory Publishers*, 756 F.2d 801, 810, n.9 (11th Cir. 1985); *BellSouth Adv. & Pub. v. Donnelley Info. Pub.*, 719 F.Supp. 1551, 1557 (S.D. Fla. 1988).

[12] The fountainhead of this line of cases, *Jewelers' Circular Pub. Co. v. Keystone Pub. Co.*, 281 F. 83 (C.C.A. N.Y.), *cert. denied*, 259 U.S. 581 (1922) eschews the phrase "sweat of the brow", declaring instead that "the materials which [a compilation author] has collected" need not "show literary skill or originality . . . or anything more than industrious collection" in order to obtain copyright protection. *Id.*, at 88.

definition—"select[ing], coordinat[ing], or arrang[ing]" the data or materials.

The goal of both tests is to define the authorship that, brought to bear on unprotected materials, makes "the resulting work as a whole . . . an *original* work of authorship." 17 U.S.C. sec. 101 (emphasis added). Thus, many cases from both approaches stress originality in the limited sense in which it is used in the Act. In passing the Act, Congress explicitly stated that "this standard [of originality] does not include requirements of novelty, ingenuity or aesthetic merit, and there is no intention to enlarge the standard of copyright protection to require them." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 51, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5659.[13] Thus, "[t]he test of originality is concededly one with a low threshold . . . ." *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490 (2d Cir. 1976).

The "industrious collection" cases can be read merely to reject the notion that some standard of novelty must be met to achieve copyright protection, while there are statements in the other line of cases that similarly reflect the low originality threshold erected by the Act. Thus, a leading "industrious collection" case states that a compilation is copyrightable even if it results from "only 'industrious collection,' not originality in the sense of novelty." *Schroeder v. William Morrow & Son*, 566 F.2d 3, 5 (7th Cir. 1977). Another case in this line similarly observes that "[o]riginality did not connote novelty or uniqueness but simply that the work be independently created." *Hutchinson Telephone*, 770 F.2d at 131.

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[13] Decisions under the prior 1909 Act held that "originality" did not require any element of novelty or uniqueness, but only independent creation. *Mazer v. Stein*, 347 U.S. at 218; *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102-3 (2nd Cir. 1951); *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490 (2nd Cir. 1976). This concept was "codif[ied] without change" in the 1976 Act. *Hutchinson Telephone*, 770 F.2d at 131.

The same approach is taken in a leading case that purportedly rejects "industrious collection," *Financial Information, Inc. v. Moody's Investor Service*, 751 F.2d 501, 507 (2d Cir. 1984), which notes that the selection, coordination or arrangement of material in a copyrightable compilation need only be "sufficient to meet the rather broad standard of originality which is phrased in terms of 'independent creation' rather than the narrower, inapplicable standards of 'uniqueness' or 'novelty' or 'ingenuity.'" Similarly, the court in *West Publishing Co. v. Mead Data Central*, 799 F.2d 1219 (8th Cir. 1986), *cert. denied*, 479 U.S. 1070 (1987), another "selection, coordination or arrangement" case, stated that "the standard for 'originality' is minimal. It is not necessary that the work be novel or unique, but only that the work have its origin with the author . . . ." 799 F.2d at 1223.[14]

Much in the case law supports a view of the two tests for compilation authorship as complementary rather than conflicting. The low threshold of originality may be met by considering both the author's activity in collecting and assembling the data, and his activity in selecting, coordinating or arranging it. Such an approach gives effect to the full text of the Act's definition of compilation, 17 U.S.C. sec. 101, and recognizes the role played by all listed aspects of compilation authorship.

B. The Court's Decision Should Reflect The Role Of Strong Copyright Protection In Providing Practical Incentives For The Development Of Databases And Other Compilations

Some early cases on copyright in compilations dismiss these works as trivial. *See Jewelers' Circular Pub. Co. v. Keystone Pub. Co.*, 281 F. 83, 97 (C.C.A. N.Y.), *cert.*

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[14] *Amici* call *West v. Mead* a "sweat of the brow" case, Brief of *Amici Curiae* in Support of Petition for Certiorari at 13. However, the holding of the case is that "West's case *arrangements* . . . are original works of authorship entitled to copyright protection." 799 F.2d at 1227 (emphasis added).

denied, 259 U.S. 581 (1922) (Hough, J, dissenting) (an "advertising row of no importance"). Whatever they may have been in the past, compilations today are big business. Commercially significant databases, such as those described in section I.A., *supra*, are the fruits of massive investments of money, time and human resources. In the Act, Congress carried out the constitutional authorization by legislating incentives for just this sort of investment, which ultimately benefits the public. U.S. Const. art. I, sec. 8, cl. 8; *Mazer v. Stein*, 347 U.S. 201 (1954). In applying the Act in this case, the Court's decision should reflect how strong copyright protection for databases and other compilations fosters a vital and growing information industry to meet society's evolving information needs.

In the competitive environment, development of a copyrightable database usually begins with identification of a market niche and potential customers. The author must assess the potential users' needs, capabilities and preferences, and then locate and evaluate the sources of the facts that are to be compiled. While sometimes there may be a single source, more often there are a multiplicity of sources whose contents must be sampled and selected for usefulness in the particular database. For example, a demographic database may draw upon public sources such as census data, property tax records, and voter registration files, and upon a plethora of proprietary sources that contain data on the target group such as purchasing patterns, subscriptions to catalogs or periodicals, and the like. Often the effort of collecting the right data involves extracting a needle of fact from a haystack of irrelevant data. Once access to the identified sources has been arranged through licensing or otherwise, their contents must be edited or refined for use in the new database, and then blended into a presentation format. The goal is to organize and deliver the information in a way that enables the intended user to access the information that he or she needs, in a manner calculated to maximize its

intelligibility and usefulness.[15] Furthermore, most commercially significant databases are to some degree dynamic, requiring updating and revision either constantly or periodically.

These activities of collecting and assembling information, and of selecting, coordinating or arranging data to maximize its utility, are often extremely expensive and time-consuming. The successful development and distribution of a database often depends on the solution of complex technological and marketing problems, all of which demand their own share of scarce resources. The process also calls for a sophisticated knowledge of information science, of the study of information seeking behavior, and of the details of storage and retrieval systems and computer programs. If the resulting compilation seems simple to the user, it is precisely because of the complex web of authorial activity that went into its design and execution.

If the task before the Court were simply to choose one line of compilation copyright cases or the other, the activities summarized above could be laid next to one of two yardsticks. One test asks whether there has been "industrious collection" of facts. The other searches for a "modicum of selection, coordination or arrangement on [the compiler's] part." *Financial Information, Inc.*, 751 F.2d at 507.[16]

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[15] "The collector may change the form of information and so make it more accessible, or he may change the organization and so make it more understandable." *Rockford Map Publishers, Inc. v. Directory Serv. Co. of Colorado, Inc.*, 768 F.2d 145, 149 (7th Cir. 1985).

[16] One particularly troublesome aspect of the approach taken in the *Financial Information, Inc.* case is the focus on "selectivity" of the compiler. The decision directs the District Court to determine whether potentially useful facts were *omitted* from the compilation, with the clear implication that such omissions would increase "the degree of 'selectivity' involved," 751 F.2d at 507, and with it the degree of authorship and hence of scope of protection for the com-

However, this is a false dichotomy, not only in terms of the caselaw and the Act, *see* Section II.A. *supra*, but also in terms of business realities. Neither approach viewed in isolation is wholly responsive to today's rapidly changing information environment. Surely "industrious collection" has changed over the decades. While canvassers do still plod through city streets to compile a directory, *see Jewelers' Circular*, 281 F. at 88, today's information collector is increasingly likely to use advanced hardware and software to roam computerized networks in search of data needed for the compilation. On the other hand, the demand to shoehorn the disparate activities of database development into identifiable acts of "selection, coordination or arrangement" begs the question the statute poses in its definition: is the "resulting work *as a whole* . . . an original work of authorship"? 17 U.S.C. sec. 101 (emphasis added).

As it applies either test, or a harmonized one of its own devising, the Court should bear in mind the consequences of unclear or insufficient protection for compilations. The database industry sells access to information. Widespread unauthorized access to commercially significant databases erodes their value and discourages investment in their creation, maintenance and improvement. A resolution of this case which appears to skew protection toward one aspect of compilation authorship, while deny-

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pilation. Under this analysis, copyright protection would be afforded to compilations in inverse proportion to their comprehensiveness, which is to say (in many cases) to their commercial value and usefulness. To use an analogy from cartography, a form of factual compilation that has been protected by copyright since the first Copyright Act in 1790, this analysis would find less authorship in a United States map that included all the major cities than in a map that omitted Chicago. Leaving aside the fact that a "comprehensive" compilation can certainly satisfy the "originality" test of the Act, *see* p. 16, *supra*, a high degree of "selectivity" is often involved in determining the scope of the universe within which facts are to be comprehensively collected.

ing or minimizing the contributions made by other aspects, could distort the incentives that have helped to fuel the explosive recent growth of the database industry.[17]

Copyright is uniquely well suited to protect the investment in existing databases and to give incentives for further development of useful compilations of materials that may, in themselves, lack copyright protection. In theory, copyright may not be the only means for accomplishing these goals, but in practice it is the broadest and best, as well as the most appropriate means in our constitutional scheme for benefitting the public by encouraging such originality. *Mazer v. Stein*, 347 U.S. 201 (1954).

Today, access to electronic databases is, to a great extent, governed by contract. But new distribution methods, such as on-line information "gateways" and easily portable compact disks containing vast compilations of material, are rapidly expanding access to parties who may not be in contractual privity with database proprietors. These growing trends threaten to increase the uncertainty of contractual controls.

Similarly, Feist quotes Professor Nimmer's observation that compilations not properly protected by copyright should be protected " 'under a theory of unfair competition'." Pet. at 8-9. But some courts that have denied copyright protection because of lack of compilation authorship have also found state law misappropriation protection to be pre-empted by section 301 of the Act, 17 U.S.C. sec. 301. *Financial Information, Inc. v. Moody's Investors Service, Inc.*, 808 F.2d 204, 208-9 (2d Cir. 1986), *cert.*

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[17] A recent federal government survey reports revenues of the electronic information service industry are expected to grow about 20 percent during 1990 to $9 billion. Revenues are expected to reach $19.2 billion over the next four years. U.S. Department of Commerce, *1990 Industrial Outlook*, 29-3 (1990). Of course, as noted above, on-line databases represent only part of the market for compilations, many of which are far more widely distributed in print form. *See* p. 7, n.5, *supra*.

denied, 484 U.S. 820 (1987). Even if state law protection were available to some compilations denied protection under copyright, such an approach would lack the uniformity and well-established legal structure provided by copyright law.

IIA and ADAPSO members are not only compilers, but also users of copyrightable compilations. Their interest in clear and strong protection for compilations is matched by their interest in access to those compilations, and to the preexisting data, for use as raw material in the development of competitive and improved information products. These interests can be harmonized because strong copyright protection is, as a practical matter, fully consistent with reasonable authorized access to copyrighted works. No trend is more pronounced throughout the information industry today than partnering and licensing arrangements in which one party is authorized to use another's compilation to develop a new product for the benefit of both. The property right to exclude others is often exercised to invite participation by others on mutually beneficial terms. If copyright protection for the compilation is weak or uncertain, authorized access, and with it public availability of the underlying data, may be reduced, not enhanced.

CONCLUSION

For the reasons stated, the Information Industry Association and ADAPSO, The Computer and Software Services Industry Association, Inc. respectfully urge the Court to consider the foregoing arguments in its disposition of this case.

Respectfully submitted,

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